March 13, 2006

**By Electronic Mail**

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

**Re: Comments on Advisory Opinion Request 2006–11**

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to AOR 2006–11, an advisory opinion request submitted by the Washington Democratic State Central Committee (the "Committee"), seeking advice "on the proper allocation between the Committee and a federal candidate of the costs of a mass mailing." AOR 2006–11 at 1. Specifically, "[t]he Committee seeks confirmation that the Federal Election Campaign Act of 1971, as amended (the "Act") permits the Committee and the federal candidate who will be clearly identified in the mass mailing to each pay 50% of the mass mailing's costs." AOR 2006–11 at 2.

For the reasons set forth below, the Commission should advise the Committee that the Committee and the clearly identified federal candidate may each pay 50% of the cost of the mass mailing. However, the Commission should further advise the Committee that its payment for the proposed mass mailing would constitute payment for a "coordinated communication" under 11 C.F.R. § 109.37. As such, the Committee's payment for the mass mailing would constitute either an in-kind contribution to the clearly identified federal candidate subject to contribution limits established by 2 U.S.C. § 441a(a), or a coordinated party expenditure subject to the limits established by 2 U.S.C. § 441a(d).[1]

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[1] *See also* 11 C.F.R. §§ 110.1 (limiting contributions by persons other than multicandidate political committees), 110.2 (limiting contributions by multicandidate political committees), and 109.32 (coordinated party expenditure limits). The Committee does not specify in AOR 2006–11 whether its proposed mass mailings would be distributed in connection with the primary election or general election of the clearly identified federal candidate. Given that the proposed mass mailing would include a generic reference in support of Democratic candidates, it seems most likely that the mass mailing would be distributed in connection with the general election. In the event a mass mailing is distributed in connection with a federal candidate's general election campaign, payment for such mass mailing would constitute either an in-kind contribution subject to the limits established by 2 U.S.C. § 441a(a) and interpreted by 11 C.F.R. §§ 110.1 and 110.2, or a coordinated party expenditure subject to the limit established by 2 U.S.C. § 441a(d) and interpreted by 11 C.F.R. § 109.32. However, in the event a mass mailing is distributed in connection with a federal candidate's primary election campaign, payment for

The Commission should further advise the Committee that the attribution scheme regarding telephone banks established by 11 C.F.R. § 106.8 is inapplicable to mass mailings. In adopting 11 C.F.R. § 106.8, the Commission explicitly considered and rejected including other types of communication, such as print media, in this attribution scheme. *See* Party Committee Telephone Banks Final Rule and Explanation & Justification ("E&J"), 68 Fed. Reg. 64517, 64518 (Nov. 14, 2003). Any new rule of law extending such an attribution scheme to mass mailings or other types of communication must be established through the rulemaking process, not through issuance of an advisory opinion.

Finally, the Commission should recognize that the new rule of law requested by the Committee would eviscerate existing statutory limits on coordinated activity between party committees and federal candidates.

## I. Any Committee payment for its proposed coordinated communication would constitute either an in-kind contribution or a coordinated party expenditure subject to the limits established by 2 U.S.C. § 441a.

The Committee states explicitly that "it intends to coordinate, within the meaning of 2 U.S.C. § 441a(a)(7)(B), with the federal candidate who is to be clearly identified in a particular mass mailing." AOR 2006–11 at 1.

The cited provision of the Federal Election Campaign Act (FECA) provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate . . . shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). The Committee's proposed mass mailing activity clearly and admittedly falls within the scope of this statutory provision. As such, any Committee payment for the proposed mailing would constitute an in-kind contribution to the clearly identified federal candidate subject to contribution limits established by 2 U.S.C. § 441a(a), or a coordinated party expenditure subject to the limits established by 2 U.S.C. § 441a(d).

The Commission's regulations interpreting the statutory restrictions on coordinated activity apply to the Committee's proposed mass mailing activity with equal clarity. The regulations provide that a communication is coordinated with a candidate when the communication:

- is paid for by a party committee;
- satisfies at least one of the coordination regulation content standards; and
- satisfies at least one of the coordination regulation conduct standards.

11 C.F.R. § 109.37(a). The Commission's regulations also make clear that "a payment by a political party committee for a communication that is coordinated with a candidate . . . must be treated by the political party committee making the payment as either: (1) An in-kind

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such mass mailing would constitute an in-kind contribution to such candidate, subject to the amount limit established by 2 U.S.C. § 441a(a) and interpreted by 11 C.F.R. §§ 110.1 and 110.2.

contribution for the purpose of influencing a Federal election . . . to the candidate with whom it was coordinated . . . ; or (2) A coordinated party expenditure pursuant to coordinated party expenditure authority . . . in connection with the general election campaign of the candidate with whom it was coordinated . . . ." 11 C.F.R. § 109.37(b).

The mass mailings proposed by the Committee in AOR 2006–11 would undoubtedly meet the three requirements of 11 C.F.R. § 109.37(a). The Committee does not dispute this conclusion in its advisory opinion request.

First, 50% of the mass mailing's costs would be paid for by a political party committee.

Second, the communications would meet the content standard at 11 C.F.R. 109.37(a)(2)(ii), because the communications would meet the definition of "public communication" at 11 C.F.R. § 100.26, and expressly advocate the election of a clearly identified federal candidate. *See* AOR 2006–11 at 1–2 ("The Committee also stipulates that the mass mailing will expressly advocate the election of the clearly identified federal candidate and the other candidates of the party who are referenced generically in the mass mailing.").

Third and finally, although the Committee does not discuss the Commission's coordination regulations, the Committee stipulates that it intends to engage in conduct that would constitute coordination under FECA—leaving no reason to doubt that the Committee's conduct would likewise meet one or more of the Commission's coordination conduct standards at 11 C.F.R. § 109.37(a)(3) (incorporating 11 C.F.R. § 109.21(d)). *See* Ad. Op. 2004-1 (appearance by a federal candidate in an ad satisfies the "material involvement" conduct prong of coordination rules); Ad. Op. 2003-25 ("[I]t is highly implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication.").

Consequently, the Committee's proposed mass mailing would fall within the scope of 2 U.S.C. § 441a(a)(7)(B)(i) and would constitute "coordinated communication" under 11 C.F.R. § 109.37. Any payment for such mass mailing would constitute either an in-kind contribution to the federal candidate with whom the mailing was coordinated subject to the contribution limits of 2 U.S.C. § 441a(a), or a coordinated party expenditure subject to the limits of 2 U.S.C. § 441a(d). *See* 11 C.F.R. § 109.37(b).

## II. Any new rule of law extending the telephone bank attribution scheme established by 11 C.F.R. § 106.8 to mass mailings or other types of communication must be established through the rulemaking process, not through issuance of an advisory opinion

The Committee suggests that the telephone bank attribution scheme established by 11 C.F.R. § 106.8 should be extended to apply to the Committee's proposed mass mailings. In adopting section 106.8, the Commission considered but explicitly decided not to include in the regulation other forms of communication such as broadcast or print media. *See* Party Committee Telephone Banks Final Rule and E&J, 68 Fed. Reg. at 64518. Specifically, the Commission "decided to limit the scope of . . . section 106.8 to telephone banks . . . because each type of

communication presents different issues that need to be considered in further detail before establishing new rules." *Id.*

Given the explicitly limited scope of 11 C.F.R. § 106.8, what the Committee actually requests in AOR 2006–11 is not clarification regarding the application of the regulation to its proposed activities—because the regulation is clearly inapplicable—but, rather, the establishment of a new rule of law applicable to its proposed mass mailings.

However, any such new rule of law must be established through the rulemaking process, not through issuance of an advisory opinion. Under the Federal Election Campaign Act and Commission regulations, a new rule of law "may be initially proposed by the Commission only as a rule or regulation," not as an advisory opinion. 2 U.S.C. § 437f(b); *see also* 11 C.F.R. § 112.4(e).

The Commission based its decision not to include mass mailings and other forms of communication in regulation 106.8 on the fact that doing so would require detailed consideration that the Commission has not yet undertaken. The Commission's Explanation and Justification for the telephone bank rule makes abundantly clear that the establishment of a similar rule for broadcast or print communications—including mass mail—would require a focused, detailed rulemaking. Establishment of such a new rule of law is beyond the scope of the Commission's advisory opinion authority and would need be accomplished, if at all, through the rulemaking process.

## III. The new rule of law requested by the Committee would eviscerate existing statutory limits on coordinated activity between party committees and federal candidates.

Section 441a of FECA limits contributions from party committees such as the requestor to federal candidates, and also limits expenditures by such party committees in coordination with the general election campaigns of federal candidates. *See* 2 U.S.C. §§ 441a(a) and 441a(d). The new rule of law requested by the Committee would eviscerate these limits by enabling a party committee to engage in unlimited coordinated activity with federal candidates—simply by including in the public communication a generic reference to other candidates of the party.

Although section 106.8 of the regulations does not assume coordination has occurred between the party committee paying for a telephone bank and the federal candidate clearly identified in the telephone message, the Committee here proposes to engage in coordinated activity. The Committee further proposes it be permitted to share the costs of its mass mailings equally with the candidate with whom the Committee coordinates. The Committee's request for advice implies that its 50% of the cost of the mass mailing would not be subject to statutory and regulatory limits on coordinated communications—by analogizing its 50% of the cost of the mass mailing to the 50% of the cost of a phone bank attributed to a party committee under section 106.8.

In other words, the Committee seeks permission to engage in unlimited coordinated spending with a federal candidate on public communications that expressly advocate the election

of that federal candidate—simply by including in the communications a generic reference such as "remember to vote for other Democratic candidates." *See* Party Committee Telephone Banks Final Rule and E&J, 68 Fed. Reg. at 64519 (a variation on "Example 2").

Furthermore, although the Committee's advisory opinion request pertains only to proposed mass mailings coordinated with congressional candidates, its analysis contains no limiting principle to prevent the extension of such a new rule of law to include public communications coordinated with presidential candidates in years to come. If employed in the presidential election context, however, this coordinated spending strategy would not only eviscerate the political party contribution and expenditure limits of 2 U.S.C. § 441a, but would also undermine the voluntary presidential spending limits that candidates agree to in exchange for public financing. *See* 2 U.S.C. § 441a(b).

In short, the new rule of law proposed by the Committee would undermine longstanding statutory provisions limiting political party coordinated expenditures and in-kind contributions, as well as presidential expenditure limits. No statutory basis exists for the Committee's proposed new rule of law.

## Conclusion

For the reasons set forth above, we urge the Commission to advise the Committee that, although the Committee and a federal candidate may each pay 50% the proposed mass mailing's costs, the Committee's payment for the mailing would constitute a payment for a "coordinated communication" and, as such, the Committee's payment would be either an in-kind contribution to the candidate or a coordinated party expenditure—either of which is subject to statutory limits. We further urge the Commission to advise the Committee that the attribution scheme regarding telephone banks established by 11 C.F.R. § 106.8 is inapplicable to mass mailings. Finally, we urge the Commission to recognize that any new rule of law extending such an attribution scheme to mass mailings or other types of communication must be established through the rulemaking process, not through issuance of an advisory opinion—and that such a rule would eviscerate existing statutory limits on coordinated activity between party committees and federal candidates.

Respectfully,

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